No. 90-5635

In The

Supreme Court of the United States

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, WARDEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 21, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. McCARTHY	:	
	:	CIVIL ACTION
v.	:	NO. H83 278
CARL ROBINSON, Warden	:	

REFERRAL TO MAGISTRATE

The above-entitled case is referred to Magistrate F. Owen Eagan for the following purpose: further pretrial proceedings. It is so ordered.

Date: March 25, 1983

_____
UNITED STATES
DISTRICT JUDGE

Hartford, Connecticut

FORM 1

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. SEC. 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL CASE NO. H 83 278
[Stamp omitted]

John J. McCarthy

(Enter above the full name and address of the plaintiff in this motion)

v.

Warden Carl Robinson

(Enter above the full name and address of the defendant or defendants in this action)

1. Previous Lawsuits

   A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

      Yes ( ) No (x)

   B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

   1. Parties to this previous lawsuit

      Plaintiffs _____

Defendants _____

2. Court (if federal court, name the district; if state court, name the county)

3. Docket Number _____

4. Name the judge to whom case was assigned.

5. Deposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

6. Approximate date of filing lawsuit _____

7. Approximate date of disposition _____

II. Place of present confinement Somers Prison

A. Is there a prisoner grievance procedure in this institution?

yes ( ) No (x)

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes (x) No ( )

C. If your answer is YES,

1. What steps did you take?

Ombudsmen

2. What was the result?

None

D. If your answer is NO, explain why not.

E. If there is no prison grievance procedure in the institution did you complain to prison authorities?

Yes ( ) No ( )

F. If your answer is YES,

1. What steps did you take?

2. What was the result?

III. Statement of Claim

(State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach extra sheet if necessary and include one copy of this extra sheet for each copy of the complaint submitted).

On 7, 13, 82, I was tear Gassed in cell F-73 for no reason.

IV. Relief

(*State briefly exactly what you want the court to do for you.* Make no legal arguments. Cite no cases or statutes.)

Grant me $100,000 in damages. Correct useage of such wepons [sic] – Get me out of Prison

SIGNED THIS 14 DAY OF March, 1983.

s/ John McCarthy
SIGNATURE OF PLAINTIFF

I declare under penalty of perjury that the foregoing is true and correct.

3, 14, 83

s/ John McCarthy
SIGNATURE OF PLAINTIFF

If you wish to proceed IN FORMA PAUPERIS, complete Form No. 2.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of Title 28, U.S.C. § 636(c), the parties to the above-captioned civil matter hereby voluntarily waive their rights to proceed before a judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

/s/ John McCarthy
John J. McCarthy, Pro Se — 2/28/85 Date

/s/ Patricia M. Strong
Patricia M. Strong,
Defendant's Counsel — 2/28/85 Date

[Do *not* execute this portion of the Consent Form if the parties desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the parties elect to take any appeal in this case to a district court judge.

/s/ John McCarthy
John J. McCarthy, Pro Se — 2/28/85 Date

/s/ Patricia M Strong
Patricia M. Strong,
Defendant's Counsel — 2/28/85 Date

_____ Date

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate F. Owen Eagan for all further proceedings and the entry of judgment in accordance with Title 28, U.S.C. § 636(c) and the foregoing consent of the parties.

/s/ José A. Cabranes
José A. Cabranes, U.S.D.J.

3/5/85

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

AMENDED COMPLAINT

Plaintiff John J. McCarthy, pursuant to rule 15(a) and 19(a), Fed. R. Civ. Proc., requests leave to file an amended complaint adding four parties and substituting one.

1. Plaintiff in his original complaint named Carl Robinson defendant, since this time of filing Carl Robinson has died and was replaced by Warden George Bronson.

2. Because there were violations of Administrative Directives involved in the petitioners complaint, petitioner would like to add Commissioner Raymond Lopes also as defendant.

3. Since the filing of the complaint the petitioner has determined the names of the other officers involved. Officer Loutenent [sic] Stvev [sic] Tozier, officer Paul Lusa, and officer Mickiewicz, all who are correctional officers and working for then Warden Carl Robinson.

4. On July 13, 1982 the above mentioned officers in (3) Violated administrative Directives and maliciously and sadistically for the very purpose of causing harm aauthorized [sic] and used a chemical weapon and assaulted the plaintiff John J. McCarthy #14163.

5. Plaintiff John J. McCarthy would like to seek $10,000 relief from each named defendant.

April 12, 1985 After oral argument at Somers Prison on April 11, 1985, permission to file this Amended Complaint is granted. Plaintiff is given until May 12, 1985, to file his Second Amended Complaint.

/s/ (Illegible)
United States Magistrate

WHEREFORE, The plaintiff requests this court to order that Raymond Lopes, George Bronson, Loutenent Steve Tozier, Officer Paul Lusa and Officer Mickiewicz be added as party defendants.

The Plaintiff
John J. McCarthy #14163

By /s/ John J. McCarthy
John J. McCarthy #14163
P.O. Box 100
Somers, Conn., 06071

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

SECOND AMENDED (CIVIL RIGHTS) COMPLAINT
WITH A JURY DEMAND

This is a § 1983 action filed by John J. McCarthy, a state prisoner, on April 11, 1983 alleging violation of his constitutional rights and seeking money damages, declaratory judgment, and injunctive relief. The plaintiff requests a trial by jury.

I. Jurisdiction

1. This is a civil rights action under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. § 1343. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 as well as injunctive relief. Plaintiff also invokes the pendent jurisdiction of this Court.

II. Parties

a. Plaintiffs

2. Plaintiff John J. McCarthy is and was at all times mentioned herein a prisoner of the state of Connecticut in the custody of the Connecticut Department of Corrections confined at the Connecticut Correctional Institute at Somers, Connecticut (hereinafter called "CCI-Somers" for purposes of this Complaint).

b. Defendants

3. Defendant Carl Robinson was the Warden of CCI-Somers until his death on December 18, 1983. Defendant Carl Robinson was legally responsible for the daily operation of CCI-Somers prior to December 18, 1983 and, specifically, on July 13, 1982 and for the welfare of all the inmates then confined in that prison.

4. Defendant George Bronson is the present Warden of CCI-Somers. He replaced the above-named defendant shortly after that defendant's death (first as "Acting Warden" then as Warden) on December 18, 1983). Defendant Bronson is lagally [sic] responsible for the daily operation of CCI-Somers and for the welfare of all the inmates of that prison. On or about July 13, 1982, Defendant George Bronson served as the Assistant Warden of Operations at CCI-Somers.

5. Defendant John Manson was the Commissioner of the Department of Corrections of the State of Connecticut until his death on September 17, 1983. He was legally responsible for the overall operation of the Department on or about July 13, 1982 and for the operation of each institution under its jurisdiction including CCI-Somers.

6. Defendant Steve Tozier is a Correctional Lieutenant at CCI-Somers and, as regards this complaint, was the Supervisor of Cell Block F on July 13, 1982 and the supervisor of the below-next named defendants.

7. Defendant Mickiewicz, Lusa, Jorge, Texiera, Falk, Flowers and Bond are each Correctional Officers of the Department of Corrections, who, at all times

mentioned in this complaint, were assigned to CCI-Somers.

8. Each defendant is sued individually and in his official capacity. At all times mentioned in this complaint each defendant acted under color of Connecticut law.

III. Facts

9. The original complaint in this case was filed on April 11, 1983.

10. On July 13, 1982 at approximately 1:45 P.M., plaintiff was ordered by defendant Mickiewicz to move from his cell (F-36) located in the area of CCI-Somers known as F-Block to another cell located in F-Block (F-85).

11. Plaintiff requested that he be given an explanation of the reason for said move from a supervising officer.

12. No explanation of the reason for said move was provided to plaintiff.

13. Plaintiff refused to move.

14. Defendant Lieutenant Tozier, acting as supervisor of F-Block, authorized the use of force including the use of a chemical weapon to remove plaintiff from his cell (F-36).

15. Plaintiff was forceably removed from his cell by defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond with the use of a chemical weapon.

16. The chemical weapon used to remove plaintiff from his cell was a Tear Gas Duster commonly referred to by correctional sadists as "Big Red."

17. At the time plaintiff was forceably removed from his cell, Administrative Directives of the Department (of Corrections) did not contain a written standard for the use of force.

18. On July 13, 1982 at approximately 2:30 P.M., defendant Tozier ordered defendant Lusa to "gas" the plaintiff.

19. During the course of the forceable removal of the plaintiff from his cell and the giving of the above-said order, defendant Tozier was not line-or-sight of the incident.

20. At the conclusion of 'gassing' the plaintiff, defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond handcuffed the plaintiff and removed him from his cell to another isolation cell.

21. During the course of the afore-mentioned incident the plaintiff did not resist defendants Lusa, Jorge, Texeira, Falk, Flowers and/or Bond, nor did plaintiff threaten any of those defendants with bodily harm.

22. On information and belief, defendant Mickeiwicz had conspired with other prisoners involved in racial riots in F-Block to move me from F-36 to F-85, where those riots were occurring, in order to involve me in those riots.

23. According to the F-Block Log Book, plaintiff was removed from his cell at 2:30 P.M. by defendants Lusa, Jorge, Texeira, Falk, Flowers, and Bond.

24. The Tear Gas Duster mentioned, supra, is a more powerful weapon than mace.

25. The Incident Report signed by defendant Tozier indicates by check-off that "force", "mace", and "restraints" were used in the afore-mentioned forceable removal of plaintiff from his cell.

26. Defendant Tozier stated to the Correctional Ombuds person that he authorized the use of the Tear Gas Duster because: a) he did not have confidence that mace would be effective; and b) he wanted something faster and stronger.

27. There is no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

28. On July 13, 1982 there was no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

29. On information and belief obtained from Training Officer Fields and Standards Compliance Supervisor Mary Anne Connors of the Department (of Corrections):

a) The tear gas duster is considerably more powerful and faster acting than mace.

b) The duster is particularly effective for situations where there is a physical barrier

between the inmate and the officers which would preclude the use of mace (which requires direct contact to be effective); the duster can also be sprayed at a distance and the gaseous cloud that results can "roll" forward and still have an incapacitative effect.

c) The tear gas duster is a more dangerous weapon than mace because of its greater potential to cause burning; to prevent or reduce burning, the area of exposure must be promptly flushed with water.

d) The duster is not supposed to be fired within four feet of the subject nor is it supposed to be aimed at the eyes or head (in contrast to the instructions for mace which specifically call for aiming the weapon between the chin and upper chest area of the subject at close range).

e) The particular model weapon used in this case had proved to be especially dangerous due to an excessively high concentration of the irritant chemical, for which reason the manufacturer had recommended discontinuing its use.

30. There were no written directives governing the use of chemical weapons other than mace at the time this incident occurred.

31. The Directives for use of mace state in relevant part: "It has an approximate range of 15 to 20 feet . . . Being a weapon, final decisions in the firing of this weapon must be made by the Shift Supervisor on duty at the institution at the time."

32. Written policy and procedure of the Department of Corrections and the Institution did not provide for the use of the tear gas duster.

33. Mace was the chemical weapon of choice for the Department of Corrections in a situation involving a single inmate.

34. There was no evidence that the plaintiff was immune to the effects of mace.

35. Plaintiff was confined in his cell, alone, and there were no visual obstructions or significant physical barriers.

36. Plaintiff was not afforded a shower until at least two and one-half hours after the incident.

37. A rinse was especially important in this incident because the weapon had been fired directly at the plaintiff.

38. Plaintiff did not recieve [sic] medical attention until approximately seven hours after the incident and no Medical Incident Report accompanied the Incident Reports of July 13, 1982. The medical records at the CCI-Somers Hospital indicate that Dr. Johnson saw the plaintiff on July 15, 1982. Dr. Johnson observed chemical burns on plaintiff's arm, under his arm, and in his scalp. Plaintiff was treated at that time with an ointment.

39. Post-incident treatment of the plaintiff was inadequate.

40. The gas duster was not properly deployed.

41. The reports of the incident are deficient in that:

a. A use of Mace Report was filed and "mace" was checked off on the Incident Report, creating an inaccurate and misleading record. It was not evident from the record that tear gas had been used.

b. It is not evident from the Incident Report that defendant Tozier was not at the immediate site of the incident. It is not evident that he did not give the order to fire the weapon. The reports did not state where the supervissor [sic] was at the time the gas was dispersed, who gave the order to discharge the weapon, at what range the weapon was discharged, and where it was aimed. Such information is critical in determining whether a chemical weapon was properly deployed.

c. A Medical Incident Report was not filed with the Incident Report. Such a report is required by Administrative Directive 2.3 on reporting of incidents involving use of force.

42. At the time of the incident, neither the Administrative Directives nor the CCI-Somers Operational Directives contained a use of force doctrine. Neither addressed the use of the tear gas duster or other chemical weapons, except mace.

43. Plaintiff suffered extensive injuries to his body, some of which are permanent, as a result of the use of the tear gas duster.

44. On July 14, 1982 at 8:15 A.M. Correctional Officer issued plaintiff a disciplinary report signed

by defendant Mickiewicz charging plaintiff with "Disobeying a direct order" based on plaintiff's refusal to move from his cell.

45. After plaintiff was forceably removed from cell F-36, another inmate was placed in that cell along with plaintiff's personal effects.

46. Another prisoner was confined in cell F-36 along with plaintiff's personal property from approximately 3:00 P.M. until approximately 9:00 P.M. on July 13, 1982.

47. After another prisoner was removed from plaintiff's cell, Correctional Officers Higgins and Dudek purportedly searched plaintiff's cell and found a 10" long shank (home-fashioned knife).

48. The shank referred to above was found among the plaintiff's personal effects.

49. The shank referred to in paragraphs 47 and 48, supra, was not found in the vicinity of plaintiff's bed in cell F-36.

50. On July 13, 1982 at 10:45 P.M. plaintiff's cell (F-36) was searched and Correctional Officer Higgins reported finding the shank described in paragraph 47, supra, among plaintiff's personal property.

51. On July 13, 1982 at 11:30 P.M. plaintiff was issued a disciplinary report signed by Correctional Officer Higgins charging plaintiff with possession of "Contraband" based on the afore-mentioned finding of shank in cell F-36.

52. On July 16, 1982, a hearing was held concerning the disciplinary report described paragraph 44, supra, at which plaintiff plead not guilty to the charge of disobeying a direct order.

53. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including indefinite confinement to punitive segregation and recommended loss of sixty days good conduct time.

54. On July 16, 1982, a hearing was held concerning the disciplinary report described in paragraphs 47 and 48, supra, at which plaintiff plead not guilty to the charge of possession of contraband "class A".

55. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including idefinite [sic] confinement to punitive segregation and recommended loss of sixty days good conduct time.

56. On August 1, 1982, plaintiff was notified by defendant Manson that sixty days of good conduct time had been forfeited as a result of the disciplinary hearing mentioned in paragraphs 52 through 55, above.

57. (reserved for future amendments)

58. (reserved for future amendments)

59. (reserved for future amendments)

60. (reserved for future amendments)

IV. Legal Claims

a. First Cause of Action

61. The actions of the defendants stated in paragraphs 9 through 60 denied plaintiff due process of law in violation of the Fourteenth Amendment to the United States Constitution.

62. Plaintiff's Fourteenth Amendment right to be free of unjustified and excessive use of force was violated when

a) he was tear gassed and

b) forceably removed from his cell.

63. Plaintiff's Fourteenth Amendment right not to be deprived of his liberty interest was violated when he was deprived of his statutorily created good conduct time.

b. Second Cause of Action

64. The actions of the defendants stated in paragraphs 9 through 43 violated state law.

65. Plaintiff alleges that defendants violated state law of assault and battery and the regulations of the Connecticut Department of Corrections with respect to the lawful use of force when plaintiff was sprayed with tear gas while in his cell.

c. Third Cause of Action

66. The actions of the defendant stated in paragraphs 9 through 45 denied plaintiff of his right to freedom from cruel, unusual and corporeal [sic] punishments in violation of the Eighth Amendment to the United States Constitution and subjected the plaintiff to punishments imposed without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

67. Plaintiff's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishments imposed without due process of law were violated when

a) he was tear gassed and

b) forceably removed from his cell.

V. Relief

WHEREFORE, plaintiff requests this Honorable Court grant the following relief:

A. Issue a declatory judgment that defendants violated the United States Constitution and state law when they:

1) used the tear gas duster on plaintiff without justification;

2) forceably removed plaintiff from cell F-36 and

3) deprived plaintiff of his statutorily-based liberty (good time) interest.

B. Issue an injunction ordering that defendants or their agents:

1) refrain from using tear gas against plaintiff, except when immediately necessary to prevent injury, death, or the destruction of valuable property;

2) immediately formulate and adopt rigid Directives restricting the use of Tear Gas and the weapon known as the Tear Gas Duster to riot situations involving multiple inmates or to situations where there exist barriers obstructing the use of mace.

3) immediately formulate and adopt rigid Directives requiring the immediate post-incident treatment of inmates sprayed with tear gas including adequate medical treatment and shower facilities.

C. Grant compensatory damages in the following amount:

1) $100,000 against defendants Robinson and Bronson;

2) $100,000 against defendant Manson;

3) $10,000 against defendants Tozier and Lusa and from each of them;

4) $10,000 against defendant Mickiewicz; and

5) $5,000 against defendants Jorge, Texeira, Falk, Flowers and Bond, and from each of them.

D. Grant punitive damages of $100,000 against each of the the [sic] defendants.

E. A jury trial on all issues triable by jury.

F. Plaintiff's cost of this suit including, but not limited to, attorney's fees (if any).

G. Such other and further relief as this court deems just, proper and equitable.

Dated: April 19, 1985 at Somers, Connecticut.

Respectfully submitted,

/s/ John J McCarthy
John J. McCarthy
Post Office Box 100
Somers, Conn. 06071
In Propria Personam

(Verification Of Service Omitted In Printing)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

Civil No. H-83-278 (JAC)

RULING ON PENDING MOTIONS

The plaintiff, an inmate at the Connecticut Correctional Institution Somers ("CCIS"), has brought this action *pro se* and *in forma pauperis* pursuant to 42 U.S.C. Sec. 1983. Included as defendants are the warden at CCIS, as well as several correctional officers. The plaintiff claims that the defendants violated his constitutional rights when they sprayed him with "Big Red," a chemical weapon similar to mace. Presently pending are: (1) Plaintiff's Motion for a Preliminary Injunction; (2) Plaintiff's Motion for Copies of all Pretrial Transcripts; and, (3) Defendants' Objection to the Plaintiff's Jury Demand in the Second Amended Complaint.

I. Plaintiff's Motion for a Preliminary Injunction

On October 7, 1986, the plaintiff filed a motion seeking an order enjoining prison officials from transferring him to another correctional facility. He claims that the defendants arranged this transfer so that his legal material would be lost in transit, thus impeding his access to the court. He further states that officials effectuated this transfer in retaliation for the numerous legal actions the plaintiff has filed against Department of Corrections employees. However, by October 6, 1986, the plaintiff already had been transferred to the United States Penitentiary in Terre Haute, Indiana. *See* Affidavit of Commissioner Lopes, Exhibit A.

Since the plaintiff seeks to block a transfer which has already occurred, his request for injunctive relief is moot. *See Bevah v. Coughlin*, 789 F.2d 986 (2d Cir. 1986). Moreover, an inmate ordinarily has no constitutionally protected interest in remaining in one facility as opposed to another. *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976). In this particular case, the plaintiff's allegation that his transfer was effectuated for an improper reason does not change this conclusion. The plaintiff, while confined at CCIS, has received over forty misconduct reports since 1981. He has engaged extensively in conduct with has jeopardized institutional order and security. Prison officials have transferred the plaintiff to another institution in order to maintain order at CCIS, as well as to offer the plaintiff an opportunity to get a fresh start in a different general prison population. *See* Lopes Affidavit. Officials are afforded wide-ranging deference in executing practices designed to preserve internal order and security. *Bell v. Wolfish*, 441 U.S. 520 (1979). Since the decision to transfer the plaintiff is supported by a valid reason, the fact that it may have temporarily hindered the plaintiff's ability to file papers in this Court does not render the transfer unlawful. *See Sher v. Coughlin*, 739 F.2d 77 (2d Cir. 1984). The plaintiff's motion for an injunction is denied.

II. Plaintiff's Motion for a Copy of Pretrial Transcripts

The plaintiff has requested "from this Court a copy of all the pretrial transcripts, except from when Attorney Brian Smith was representing [him]." Plaintiff's Motion.

Since the plaintiff has brought this action *in forma pauperis*, the Court assumes that he wants these copies free of charge. The plaintiff provides two reasons for this request: (1) He needs the transcripts to support his motion to enjoin his transfer; and, (2) He wants to view the pretrial proceedings so he can prepare a new civil rights action.

The transcripts which the plaintiff seeks would cover proceedings held before Magistrate Eagan. Generally, the Magistrate does not record pretrial conferences or other pretrial proceedings held at Somers Prison. In short, the documents which the plaintiff seeks do not exist.

Moreover, even if these documents did exist, the plaintiff has not demonstrated a present entitlement to free copies of them. The Court is authorized to provide a transcript for a person who has been permitted to *appeal in forma pauperis* if the trial judge or circuit judge certifies that the appeal is not frivolous. 28 U.S.C. Sec. 753(f). There is no clear statutory authority which suggests that the plaintiff is entitled to any trial-related transcripts prior to an appeal from a judgment of the district court. *See Toliver v. Community Action Commission*, 613 F. Supp. 1070, 1072 (S.D.N.Y. 1985). The right to proceed *in forma pauperis* does not carry with it a right to obtain copies of court documents to search for possible errors or to use for proposed or prospective litigation. *United States v. Houghton*, 388 F. Supp. 773 (N.D. Tex. 1975).

The Plaintiff's request for a copy of the pretrial transcript is denied.

III. Defendants' Objection to Plaintiff's Jury Demand

In April, 1983, the plaintiff filed his original complaint. In that complaint, he alleged that the defendant's use of mace violated his constitutional rights. He did not request a jury trial. In April, 1985, he filed an amended complaint. This complaint added four parties and substituted one, but raised no new issues. The amended complaint contained no request for a jury trial. On July 8, 1985, the same defendants were served with a second amended complaint which included a jury demand. Although more detailed, this complaint contained no new issues.

A plaintiff must demand a jury trial on the issue no later than ten days after the service of the last pleading directed to such issue. Fed. R. Civ. P. 38(b). Failure to make a timely demand constitutes a waiver of that right on all issues in the complaint. Fed. R. Civ. P. 38(d). A subsequent amendment of the original complaint does not revive the right to a jury trial unless the amendment changes the issues set forth in the original complaint. *Lanza v. Drexel and Co.*, 479 F.2d 1277, 1310 (2d Cir. 1973). Likewise, the addition of a co-defendant does not automatically revive a previously waived jury trial right unless new issues are presented in the amendment. *State Mutual Life Assurance Co. of America v. Arthur Andersen and Co.*, 581 F.2d 1045, 1049 (2d Cir. 1978).

The Plaintiff did not claim his right to a jury trial until more than two years after filing his original complaint. Although his complaints have become progressively more detailed, and have added more

defendants, all have consistently set forth the constitutionality of the use of mace as the issue to be resolved. Accordingly, the plaintiff is not entitled to a jury trial.

Conclusion

1. Plaintiff's motion for an injunction is DENIED.

2. Plaintiff's motion for pretrial transcripts is DENIED.

3. Defendants' objection to plaintiff's request for a jury trial is SUSTAINED.

SO ORDERED.

Date at New Haven, Connecticut, this 22d day of December, 1986.

s/ Jose A. Cabranes
JOSE A. CABRANES
UNITED STATES
DISTRICT JUDGE

EXCERPTS FROM TRANSCRIPT OF MARCH 24, 1988 HEARING BEFORE MAGISTRATE (at pp. 3-6)

THE COURT: Good morning, ladies and gentlemen.

This morning, ladies and gentlemen, we are here on Civil No. H-83-278 (JAC). This is McCarthy vs. Carl Robinson, and the purpose of our meeting this morning is to try this matter to its conclusion.

Now, before we get started, there are a few housekeeping matters we should take up. The first is the consent to proceed before the United States Magistrate, and it has been signed by the State, but let me explain to Mr. McCarthy what that is and then he has a choice of what he wishes to do.

On cases that are assigned from a District Court Judge to Magistrate for trial, they can be done in one of two ways: They can be tried before the Magistrate sitting as the District Court Judge with the permission of both the Plaintiffs and the Defendants, and then the Magistrate enters a final order which is then appealable usually to the District Court Judge or to the Second Circuit, depending on how the form is printed and how the parties agree.

If that is not an acceptable way, then the trial continues as the Magistrate being a fact-finder, and the Magistrate makes a recommendation to the District Court Judge – in this case it is Judge Cabranes – and that's the procedure that we go through. So you have your choice at this time. It makes no difference to me. Whichever way you prefer. The State is willing to go with the Magistrate as the fact-finder, but you do not have to.

MR. McCARTHY: Okay. Then we will have to reschedule the trial; right?

THE COURT: No. We go forward either way. We go under the Magistrate being the final fact-finder or being the recommended fact-finder. Either way, we go forward.

MR. McCARTHY: I would rather have the District Court Judge hear the case.

THE COURT: All right.

MR. McCARTHY: Are we still going to hear the case?

THE COURT: We are still going to hear the case.

MR. McCARTHY: Okay.

I will just stipulate to that. I would rather have the District Court Judge hear the case.

THE COURT: All right.

Then there will be no consent. I will return to the consent form. The Court will take it and issue a recommended finding at the conclusion of the case.

MR. McCARTHY: Okay.

THE COURT: That doesn't mean you will get another trial before the District Court Judge. He has to review my findings and review my decision.

MR. McCARTHY: So I will appeal directly to him.

THE COURT: You can do that this way, too.

MR. McCARTHY: I will go like we are doing now. I would rather he heard it.

THE COURT: You are going to be heard either way.

MR. McCARTHY: I am just saying I want to make a point that I stipulate to that fact, that I don't consent.

THE COURT: You don't consent.

MR. McCARTHY: Right.

THE COURT: All right.

Then I will return this to the Clerk of the Court. Now, can you tell me, or – let me tell you how we are going to proceed so both of you will understand.

We will proceed today until 4:00 o'clock. If there are still matters to be – if it is not concluded by that time, we will again reconvene here, I believe it is next Thursday, and continue the case at that time. We are not going day to day. We have to go Thursday to Thursday.

I would like to have an idea from each side how many witnesses you have and approximately how long you think it will take. So I will start with the Plaintiff first.

Mr. McCarthy, how many witnesses do you have?

MR. McCARTHY: Okay.

I would like to call all the Defendants in this case and –

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

RECOMMENDED FINDINGS OF FACT AND MEMORANDUM OF DECISION

At all relevant times, the plaintiff was a prisoner at the Connecticut Correctional Institution at Somers (hereinafter CCIS). He brings this action *pro se* pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his fourteenth amendment due process rights and his eighth amendment right to be free from cruel and unusual punishment when they used excessive force to remove him from his cell. Additionally, plaintiff claims that defendants committed an assault and battery against him in violation of state law. On December 22, 1986, this court determined that plaintiff's complaint and subsequent amendments set forth one issue for trial, that being: the constitutionality of defendants' use of a chemical weapon. *See Ruling on Pending Motions* at 3, 4 (filed December 22, 1986).

At the start of trial, the court noted that both Warden Robinson and Commissioner Manson are deceased. Accordingly, Warden Bronson and Commissioner Meachum were substituted in their official capacities for the deceased defendants. Additionally, plaintiff withdrew the complaint against Officers Falk, Bond, Flowers and Texeira. Thus, the sole remaining defendants are Warden Bronson, Commissioner Meachum, Lt. Tozier, Officer Mickiewicz, Officer Lusa and Officer George. Plaintiff seeks declaratory and injunctive relief, compensatory

damages in the amount of $220,000, punitive damages in the amount of $600,000 and costs.

FINDINGS OF FACT

In accordance with the provisions of 28 U.S.C. § 636(c), this matter was tried before this Magistrate over an eight day period starting March 24, 1988 and ending May 19, 1988. The following findings of fact were established by testimony elicited and exhibits submitted at trial:

1. The plaintiff is a convicted prisoner presently serving a ten to twenty year sentence for larceny in the first degree and burglary in the third degree. Additionally, plaintiff faces a six year consecutive sentence for six counts of burglary in the third degree and six counts of larceny.

2. On July 13, 1982, plaintiff was housed in cell F-36. Cell F-36 is the last cell at the end of death row. It is referred to as the "death cell" and is separated from other cells in segregation by a wall with a door.

3. In 1982, this area was used for isolation purposes where the most salient individuals were placed if they posed a threat or caused a disruption.

4. At approximately 9:00 A.M. on July 13, 1982, Lt. Tozier notified plaintiff that he would be moving to cell F-85 in administrative segregation.

5. On July 13, 1982, Lt. Tozier was director of the special offenders program which covered the segregation and protective custody units. The director of the special offenders program was responsible for all the activities in

three special units. In that capacity, Lt. Tozier was considered to be a shift supervisor and had authority to order the use of a chemical weapon.

6. Prior to July 13, 1982, Lt. Tozier received training in the use of chemical munitions at the Correctional Training Academy and as part of his supervisory training and review. He has had fourteen years of on the job training, and used chemical agents numerous times in his career.

7. Shortly after lunch, an inmate tierman for F Block named Mike Ceretta, instructed plaintiff to pack his belongings in preparation for his cell transfer. Approximately, twenty minutes later, Correctional Officer Mickiewicz visited plaintiff and asked if he was packed-up.

8. Plaintiff believed originally that Officer Mickiewicz relayed a direct order through inmate Ceretta to pack-up and prepare for his cell change. Later, when speaking directly with Officer Mickiewicz, plaintiff did not construe the instructions to pack-up as a direct order because Officer Mickiewicz did not specify that it was a direct order per se.

9. Plaintiff refused to pack his property. Instead, he indicated that he wanted to know why he was being moved and he requested to see a supervisor.

10. Officer Mickiewicz called Lt. Tozier and informed him that plaintiff refused to move. Lt. Tozier instructed Officer Mickiewicz to contact the hall keeper for help.

11. At Approximately 2:30 P.M. on July 13, 1982, plaintiff heard other inmates state that the guards were forming a "group" and "rolling".

12. Plaintiff believed the guards were coming to get him. He panicked and tied his cell door closed with pieces of clothesline and jammed a piece of plastic from a plastic spoon into the keyslot.

13. Correctional Officers Mickiewicz, Lusa, George and Flowers entered F. Block at approximately 2:30 P.M. on July 13, 1982. Before entering the death row area, they formulated a game plan for extracting plaintiff from his cell. While discussing how to remove plaintiff, the officers were joined by Lt. Tozier.

14. When the Lieutenant arrived, a description was provided of plaintiff's cell area, including the fact that plaintiff's cell bars were tied shut and that plaintiff was in an angry, agitated state.

15. It was decided that Lt. Tozier would remain out of sight of the plaintiff so as to not aggravate the situation. The officers would ask plaintiff to voluntarily come out of his cell and issue an order if necessary. If he refused, the correctional officers would enter the cell and remove the plaintiff.

16. While the correctional officers spoke with the plaintiff, Lt. Tozier remained in the proximity of F-36; positioned just outside the doorway to the annex area of F-36.

17. Plaintiff was standing in his cell holding the mattress from his bed. The officers cut the twine tied on the cell door.

18. Officer George asked plaintiff what the problem was and asked him to come out peacefully at least twice. The officers spent approximately ten to fifteen minutes trying to coax plaintiff out of his cell. Officer Mickiewicz then ordered plaintiff to come out.

19. Plaintiff refused to exit the cell and made threatening statements consisting of "You will have to come and get me," and "Someone is going to get hurt."

20. Officer Lusa approached plaintiff's cell door and placed a tear gas "duster on the bars of the door.

21. Officer Lusa was the hall keeper of F Block on July 13, 1982. As the hall keeper, Officer Lusa's duties included responding to situations involving moving inmates, troublesome inmates, hang suicides, falls, and alarms.

22. When hall keepers responded to a call to remove an inmate from a cell, they would always bring a bag with necessary tools, inclusing [sic] tear gas and mace. Officer Lusa had substantial experience with the tear gas duster and has used it on numerous occasions prior to July 13, 1982.

23. When plaintiff saw the duster, he used the mattress to shield himself and made no further response.

24. Plaintiff suddenly lunged toward a specific area of his cell. On the belief that plaintiff was lunging for a weapon, and at the verbal command of Lt. Tozier, Officer Lusa deployed the tear gas duster.

25. Officer Lusa sprayed the duster once for about three seconds while standing approximately six feet from

the plaintiff. A fog-like dust enveloped plaintiff and he ceased to resist.

26. The piece of plastic was freed from the lock and Officers Mickiewicz, George and Lusa entered the gas-filled cell. Officer Mickiewicz handcuffed plaintiff. Physical force was not used as plaintiff did not resist at that point.

27. Officer Mickiewicz quickly escorted plaintiff to isolation cell F-43 followed by the other officers. The officers and plaintiff were in the gassed cell for approximately two to five minutes.

28. The door of cell F-36 was closed and locked so that tear gas dust would not disperse and to protect the plaintiff's property. Windows were opened and fans were in place.

29. At approximately 3:30 P.M., plaintiff arrived at the isolation area where his handcuffs were removed. He was stripped, searched, and then put into cell F-43. No rashes, burns or signs of redness were observed on plaintiff's body.

30. When plaintiff arrived in cell F-43 he requested and demanded a shower. Because plaintiff was still in an agitated and violent state of mind, Lt. Tozier decided it would not be appropriate to take plaintiff out of F-43 immediately following the gassing incident. Plaintiff was informed that he would not get a shower until he calmed down.

31. Plaintiff was not in physical danger because there was hot and cold running water in plaintiff's cell. Lt. Tozier did not order that plaintiff's water be shut off.

Considering the amount of gas used and the availability of water, there was no need to send a medic to see plaintiff at that time.

32. Approximately three hours after the incident, when Lt. Tozier was sure that plaintiff had calmed down sufficiently, he authorized the second shift supervisor to shower plaintiff.

33. Lingering gas fumes filtered into the F Block segregation unit annoying some of the inmates and inciting them to throw milk cartons and refuse from their cells. There was no large scale disturbance.

34. At approximately 4:00 P.M., Officer Dudek came on duty for the second shift in F Block. At that time, there was no smell of tear gas in the segregation unit.

35. Lt. Tozier left a verbal order for the second shift officers to search plaintiff's cell. At approximately 9:30 P.M., Officers Dudek and Higgins went to search cell F-36.

36. When correctional officers pack and secure an inmate's belongings, they generally look for contraband as well. Two officers always enter an inmate's cell together when performing a search or "shakedown" so that one officer acts as a witness to the actions of the other officer.

37. When they arrived at the partitioned separating the death row cells from the segregation cells, they found the door locked and secured.

38. Officers Dudek and Higgins unlocked the door, entered the death row area and locked the door behind them. They packed-up plaintiff's property and exited

from plaintiff's cell into the death chamber (where property is stored).

39. In the death chamber, they searched through plaintiff's property. Officer Higgins inspected a cereal box in which he found a shank, or homemade knife, stuck underneath a flap of the box. The shank was approximately ten inches long with a six inch blade. Officer Dudek took the shank, put it in his pocket, and turned it over to the shift supervisor.

40. Between 3:00 P.M. and 12:00 A.M., there was no opportunity for anyone to enter plaintiff's cell. The outer door to plaintiff's cell area was locked and all inmate tiermen were locked in their cells for a "count" at the time of the incident and at 4:00 P.M. when Officer Dudek came on duty.

41. On the evening of July 13, 1982, Nurse Rogal routinely toured the segregation unit. At approximately 9:30 that same night, plaintiff received a medical exam and was sent Caladryl ointment in response to his complaint of itchy shin.

42. On the following day, July 14, 1982, Nurse Sharon Snyder routinely toured the segregation unit. Plaintiff asked Nurse Snyder for some Tylenol. He did not complain of chemical burns or skin irritations.

43. On July 15, 1982, Dr. Carl Johnson and Nurse Sharon Snyder toured the segregation unit. Dr. Johnson examined plaintiff and noted plaintiff's complaint as a questionable chemical burn under his right arm, up his side, and in his hair. Dr. Johnson prescribed "kenalog" cream.

44. On July 16, 1982, during the course of Nurse Snyder's daily visit to segregation, plaintiff requested a decongestant.

45. On July 19, 1982, plaintiff requested more Tylenol from Nurse Snyder.

46. On July 22, 1982, during another "seg check" by Dr. Johnson, plaintiff complained of an underarm irritation. The doctor prescribed cream to be applied three times a day.

47. 47. [sic] On July 26, 1982, plaintiff's prescription for decongestion was refilled.

48. Plaintiff was not taken to the hospital for treatment after the gassing incident. To the extent that plaintiff's injuries were treated with ointments and Tylenol, they were insignificant in nature.

49. In 1982, only two chemical weapons were utilized at CCIS; mace and the 271 tear gas duster. At that time, the word "duster" had a specific meaning and was used to refer to the 271 tear gas duster. The 271 duster was designed for interior use and specifically for use in correctional facilities.

50. The active chemical agent in mace and the 271 tear gas duster is choloracetophenone, or "CN". CN is a lacrimating agent which induces profuse watering of the eyes. The canister containing the CN arrived at CCIS premixed by the manufacturer. The mixture consists of "anti-caking agent" and 64% CN. There was no way to influence the chemical mixture inside the canister.

51. The proper deployment method of the 271 duster is to aim waist high at the individual. When a

barrier is used as a shield, the 271 duster should be aimed at the barrier.

52. In order for mace to be effective, it must make contact with the skin. When an inmate uses a blanket or bedding materials as a barricade, mace is considered ineffective and its use could place the officers at a risk.

53. Generally, the 271 duster was used as a preventive measure. When properly used, the 271 duster was not considered any more or less dangerous than mace or any other device in law enforcement.

54. The effect of the tear gas dust is to cause the eyes to burn and sting. The feeling is uncomfortable and unpleasant, but the sensation is short-term and does not cause lasting damage.

55. The tear gas dust is removed by shaking it from exposed clothing and applying water to the skin. Because the dust is very superficial, water removal is the recognized first aid treatment for chemical agent exposure.

56. On July 13, 1982, there were administrative directives in effect authorizing the use of force and the use of chemical weapons against inmates.

57. When deciding whether to authorize the use of a chemical weapon, a supervising officer considers a number of factors, including: (i) the potentially assaultive and aggressive nature of the inmate, (ii) whether the inmate is in a cell refusing to come out, and (iii) whether the inmate is threatening the officers with physical harm.

58. Additionally, there are three or four reasons for using a chemical weapon on an inmate. One reason is to

aid in the movement of an inmate from an area that they control to an area controlled by the officers.

59. In light of the kind of bars on the plaintiff's cell, the placement of foreign objects in the keyway, and the clothesline tied on the cell door, plaintiff was in control of the area of his cell.

60. Because plaintiff could not be evacuated in the event of a fire or emergency, it would not have been proper or appropriate for defendants to walk away from the situation.

61. On June 2, 1982, plaintiff wrote to Assistant Warden Bronson and Commissioner Manson complaining of harrassment [sic] by Lt. Tozier and requesting reconsideration of his segregation status.

62. Assistant Warden Bronson responded stating that he found Lt. Tozier's actions were appropriate and consistent with procedure. Additionally, he informed plaintiff that the Special Offenders Program classification committee would recommend his return to general population if he remained misconduct free for a period of thirty days.

63. Commissioner Manson informed plaintiff that his placement in segregation was appropriate due to plaintiff's ongoing and consistent disciplinary record. The Commissioner indicated that plaintiff was in the least desirable of cells because he destroyed state property. Additionally, Commissioner Manson noted that plaintiff's record in segregation had been "horrendous." When plaintiff demonstrated an ability to abide by prison rules, he would be released into population. In the interim,

plaintiff was instructed that he should not "put [his] feelings on Lt. Tozier or any other person, staff or inmate."

64. Lt. Tozier was unaware of plaintiff's letters to the Assistant Warden and the Commissioner. He received no reprimand with respect to plaintiff's allegations. In fourteen years of service, Lt. Tozier was never reprimanded in relation to his duties.

65. On July 13, 1982, Lt. Tozier made a discretionary decision to use force based on the need to maintain order, discipline, and the security of F Block and the institution. The decision was made only after Lt. Tozier arrived on the scene. Lt. Tozier's decision was based on his evaluation of the situation and his knowledge of the inmate.

66. As director of the Special Offenders Program, Lt. Tozier reviewed plaintiff's misconduct record for special offender classification meetings. From a period of 1/6/82 to 7/13/82, plaintiff received approximately fifteen misconduct reports involving charges of tampering with locking devices, destroying state property, possession of drugs and intoxicating substances and possession of a weapon.

67. Lt. Tozier's decision to use a chemical agent was not made in order to punish plaintiff, cause unnecessary pain, or in retaliation for the letters plaintiff sent.

68. The primary reason for the chain of events that occurred on July 13, 1982 was plaintiff's refusal to obey lawful orders issued by the defendants. When an inmate is ordered to change cells, he must follow the order then

make his appeal to the supervisor. Plaintiff failed to comply with a lawful order and made threatening statements.

69. Under the circumstances, use of the 271 tear gas duster was in the best interest of those involved. The 271 duster was safer and more humane than physical force which might have resulted in injury to the officers as well as the plaintiff. The barricade raised by plaintiff necessitated using the 271 duster rather than mace. Under the circumstances, there were not less forceful means to remove plaintiff from his cell.

70. The use of the 271 duster was appropriate and proper. An excessive amount of gas was not expelled. The use of force was reasonably related to the need to remove plaintiff from his cell and restore order and discipline to the block.

DISCUSSION

As stated above, the plaintiff claims that defendants used excessive force to remove him from his cell and caused serious injuries as a result. Plaintiff asserts that defendants' actions subjected him to cruel and unusual punishment in violation of the eighth amendment and deprived him of substantial liberties without due process of law in violation of the fourteenth amendment.

I. Eighth Amendment Claim

The Second Circuit has set forth the following factors as useful in determining whether alleged excessive force amounts to a constitutional violation.

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or resotre [sic] discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

When proving an eighth amendment violation, the plaintiff has an extremely difficult burden. " 'After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)). "[C]onduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Id.* Thus, the infliction of pain as a security measure is not a constitutional violation simply because it may later appear unreasonable. *Id.* The test turns on "whether force [was] applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Glick*, 481 F.2d at 1033.

Examination of the record in this case does not reveal credible evidence to support plaintiff's claims. The record indicates that plaintiff was notified at least twice that he would be changing cells sometime during the day of July 13, 1982. Plaintiff was asked repeatedly to move voluntarily and then was ordered to come out of cell. Regardless of his justifications for refusing to move, plaintiff had

no constitutionally protected right to disobey a lawful order from a prison official. Nor did plaintiff have a constitutional right to know why he was being moved. Finally, plaintiff had no constitutional right to remain incarcerated in a particular cell. *See Olim v. Wakinekona*, 461 U.S. 238 (1983); *Burr v. Duckworth*, 547 F. Supp. 192, 197 (N.D. Ind. 1982), *aff'd mem.*, 746 F.2d 1482 (7th Cir. 1984).

Plaintiff contends that defendants used the 271 duster solely as a disciplinary tool because he "stray[ed] from the letter of the prison code." Clearly, this was not a situation where force was used to punish plaintiff for violating the Code of Penal Discipline. Plaintiff's actions in barricading himself in his cell and jamming the cell lock created a threat to the safety of the institution as well as to himself. In the event of an emergency or a fire, plaintiff could not have been evacuated quickly and safely. Additionally, plaintiff made threatening comments to the officers and had a history of misconduct suggesting a potentially assaultive or aggressive nature. In light of these circumstances, this court cannot find that use of the chemical weapon was unauthorized or unreasonable.

Plaintiff alleges that the amount of chemical agent used was excessive and resulted in severe burns and open, raw, sores. However, the record indicates that Officer Lusa sprayed the tear gas for approximately two to three seconds. Less than one hour later, when Officer Dudek reported for duty, there was no smell of tear gas outside the segregation unit. Further, none of the officers who participated in the incident required medical treatment or showers after being exposed to the same amount of gas. Moreover, plaintiff's medical records indicate that

plaintiff experienced only "itchy skin" a few hours after the incident and minor skin irritation lasting approximately one week. The skin rashes were treated with creams and ointments and did not require transferring plaintiff to an outside facility or the hospital unit. On at least three occasions during the two weeks following the incident, plaintiff did not even mention discomfort from the gassing and requested only Tylenol and decongestants from the medical staff.

Lastly, plaintiff argues that Lt. Tozier's decision to use the 271 tear gas duster was malicious, retaliatory, and made in bad faith. There is no evidence in the record to support such a claim. Of the fifteen misconduct reports received by palintiff [sic] prior to the incident, only one had been issued by Lt. Tozier. Furthermore, plaintiff himself testified that while other inmates and guards called him names and verbally abused him, Lt. Tozier never uttered derogatory remarks toward plaintiff. Finally, in response to plaintiff's complaints regarding Lt. Tozier, both Commissioner Manson, and Warden Bronson found the Lieutenant's behavior to be appropriate and beyond reproach. Accordingly, plaintiff has failed to demonstrate that the use of force was applied maliciously or sadistically for the very purpose of causing harm.

II. Fourteenth Amendment Claim

Plaintiff further proposes liability alleging that he was deprived of a state created liberty interest without due process of law in violation of the fourteenth amendment. It would be difficult to comprehend conduct which would "shock the conscience" of this court and so violate

the fourteenth amendment, yet not also be " 'inconsistent with contemporary standards of decency' and 'repugnant to the conscience of mankind,' in violation of the Eighth." *Whitley*, 475 U.S. at 327 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103, 106 (1976)) (citation omitted).

Simply stated, in the prison security context, "the Due Process Clause affords [the plaintiff] no greater protection than does the Cruel and Unusual Punishment Clause." *Whitley*, 475 U.S. at 327. Plaintiff has failed to demonstrate that defendants' use of a chemical weapon was unreasonable or unauthorized. Accordingly, the court concludes that the due process clause does not serve as an alternative basis for liability.

CONCLUSION

For the foregoing reasons, plaintiff has failed to establish that defendants' use of a chemical weapon violated his constitutional rights under the eighth or the fourteenth amendments. Accordingly, judgment shall enter in favor of the defendants.

Any objections to this report and recommendation must be filed with the Clerk of Courts within fifteen (15) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. 28 U.S.C. § 636.

Dated at Hartford, Connecticut, this 22nd day of May 1989.

/s/ F. Owen Eagan
F. Owen Eagan
United States Magistrate

Absent a timely objection to the Magistrate's recommended ruling, *see* 28 U.S.C. § 636(b)(1) and Rule 2 of the Local Rules for U.S. Magistrates (D. Conn.), and for the reasons stated by the Magistrate, the Recommended Findings of Fact and Memorandum of Decision is hereby accepted and adopted as the decision of the court. Accordingly, judgment shall enter in favor of the defendants. It is so ordered.

New Haven, CT June 19, 1989

/s/ Jose A. Cabranes
Jose A. Cabranes, U.S.D.J.

UNITED STATES DISTRICT COURT

——— DISTRICT OF CONNECTICUT

JOHN J. McCARTHY

JUDGMENT IN A CIVIL CASE

V.

CARL ROBINSON, Warden, GEORGE BRONSON, Warden, LT. STEVE LOZIER, OFFICER PAUL LUSA and OFFICER MICKIEWICZ

CASE NUMBER: H-83-278 (JAC) Eg

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered, by the Honorable F. Owen Eagan, United States Magistrate, and accepted and adopted by the Honorable Jose A. Cabranes, U.S. District Judge, IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendants and the plaintiff's complaint is dismissed.

June 19, 1989
Date

KEVIN F. ROWE
Clerk

/s/ Frances J. illegible
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
(Caption Omitted In Printing)
RULING ON PENDING MOTIONS

This is a *pro se* action brought under 42 U.S.C. § 1983 by a plaintiff who at all relevant times was a prisoner at the Connecticut Correctional Institution at Somers ("Somers"). On April 11, 1983, the same date the complaint was filed, I referred this case to Magistrate F. Owen Eagan for all pretrial proceedings. On February 28, 1985 plaintiff, acting *pro se*, and defendant's counsel both signed a "Consent to Proceed Before a United States Magistrate" form consenting to trial before a United States Magistrate pursuant to 28 U.S.C. § 636(c), and on March 5, 1985 I approved this form. Trial before Magistrate Eagan began at Somers on March 24, 1988, at which point plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form. After the close of trial and briefing by both sides, Magistrate Eagan on May 23, 1989 issued a document styled "Recommended Findings of Fact and Memorandum of Decision," and on June 19, 1989 I endorsed this document as follows:

> Absent a timely objection to the Magistrate's recommended ruling, *see* 28 U.S.C. § 636(b)(1) and Rule 2 of the Local Rules for U.S. Magistrates (D. Conn.), and for the reasons stated by the Magistrate, the Recommended Findings of Fact and Memorandum of Decision is hereby accepted and adopted as the decision of the court. Accordingly, judgment shall enter in favor of the defendants. It is so ordered.

The Clerk entered judgment in favor of the defendants on June 19, 1989. Both sides have now filed various motions.

Because my June 19 endorsement order contained a citation to an inappropriate subsection of the United States Code, and because it was not particularly clear in any event, I must at the outset discuss the procedural posture in which this case now appears. My March 5, 1985 order approving the "Consent to Proceed Before a United States Magistrate" form had the necessary effect of amending the referral to Magistrate Eagan to include the conducting of the trial of this case, pursuant to 28 U.S.C. § 636(c) and Rule 4 of the Local Rules for United States Magistrates (D. Conn.) ("Local Rules"). Because plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form on the first day of trial, however, Magistrate Eagan chose not to direct the entry of judgment after trial, as he was authorized to do by 28 U.S.C. § 636(c)(1) and Rule 4(A)(1) of the Local Rules. Instead, Magistrate Eagan issued a document entitled "*Recommended* Findings of Fact and Memorandum of Decision," essentially acting as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules. This prudent course of action by Magistrate Eagan was entirely appropriate.[1] Absent a

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[1] I believe it also would have been perfectly proper for Magistrate Eagan to continue to act under 28 U.S.C. § 636(c) and Rule 4 of the Local Rules. Once a case is referred to a magistrate under § 636(c), a party cannot withdraw his consent and demand that the case return to the district judge. *Fellman v. Fireman's Fund Insurance Company*, 735 F.2d 55, 57-58 (2d Cir. 1984). Such a rule is necessary to avoid "magistrate shopping" by parties, withdrawing their consent if they are unhappy with the particular magistrate to whom the referral went.

timely objection, *see* Fed. R. Civ. P. 53(e)(2) and Rule 2(c) of the Local Rules, I adopted the findings of fact recommended by Magistrate Eagan. These facts clearly compelled the entry of judgment in favor of defendants.

With this overview of the procedural posture of the case, I can now turn to the pending motions:

1. *Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989)* – Plaintiff moves, presumably under Fed. R. Civ. P. 60(b)(6), for relief from the judgment entered June 19, 1989, on the grounds that he did not receive Magistrate Eagan's Recommended Findings of Fact and Memorandum of Decision until June 7, 1989 and therefore the court did not give him sufficient time to file objections to that report prior to entering judgment. Plaintiff did file an objection to the Recommended Findings of Fact and Memorandum of decision on June 22, 1989.

Assuming for the argument only that valid objections to the Recommended Findings of Fact and Memorandum of Decision would justify relief from the judgment under Fed. R. Civ. P. 60(b)(6), or would justify alteration of the judgment under Fed. R. Civ. P. 59(e), I still cannot grant this motion. I am required to accept the findings of fact recommended by Magistrate Eagan in this case, in which he essentially acted as a special master, unless they are "clearly erroneous." *See* Fed. R. Civ. P. 53(e)(2); *Equal Employment Opportunity Commission v. Local 638*, 700 F. Supp. 739, 743 n.1 (S.D.N.Y. 1988). I have thoroughly reviewed the objections raised by plaintiff in Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989

(F. Owen Eagan) (filed June 22, 1989) and in Plaintiffs' [sic] Memorandum in Support of his Objection to the Magistrates' Recomended [sic] Findings of Facts and Memorandum of Decision Dated May 23/1989 Re: 28 U.S.C. 636(c) (filed June 22, 1989).[2] I cannot conclude that any of the factual findings challenged by plaintiff is "clearly erroneous." Even upon a *de novo* determination I would reach the same conclusions as the Magistrate regarding the matters to which there has been objection.

Accordingly, Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is therefore DENIED.

2. *Plaintiffs' [sic] Motion for a Stay of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989), Notice of Appeal to District Court Judge (filed June 22, 1989), Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989)* – Plaintiff "appeals" the "decision" of Magistrate Eagan to the district judge, and moves for transcripts for his "appeal" and a stay of the judgment pending the "appeal." As noted above, however, Magistrate Eagan did not issue a decision in this case under 28 U.S.C. § 636(c), so no "appeal" can be taken to the district judge. Therefore this "appeal" must be DISMISSED and

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[2] Aiding me greatly in conducting this review was the thorough Defendants' Memorandum in Opposition to Objections to the Magistrate's Recommended Findings of Fact and Memorandum of Decision (filed July 12, 1989).

the motions DENIED. The judgment in this case was entered upon my order, and any appeal from that judgment must be taken to the Court of Appeals.

3. *Motion for Order (filed July 12, 1989)* – Defendants seek an order (under 28 U.S.C. § 636(c)(5)[3], 28 U.S.C. § 1915(a), and 28 U.S.C. § 753(f)) certifying that an appeal in this case is frivolous, not taken in good faith, and lacking in probable cause. This motion is DENIED. Because of the unique procedural posture of this case I cannot say that an appeal to the Court of Appeals would not be taken in good faith within the meaning of § 1915(a).

4. *Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989)* – Plaintiff moves for an order directing the court reporter to prepare the entire transcript of the trial proceedings and deliver one copy to the Court Clerk and one copy to the plaintiff. Presumably plaintiff is requesting that the United States *pay the fees* for preparing these transcripts, pursuant to 28 U.S.C. § 753(f). This motion must be DENIED, as I cannot certify that "the appeal is not frivolous (but presents a substantial question)" within the meaning of § 753(f).[4] In addition I note that the record of this case as it now stands is

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[3] The motion cites "28 U.S.C. § 636(4)(5)," but since no such subsection exists I assume defendants mean § 636(c)(5).

[4] Although I have denied defendants' motion to certify that an appeal would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a), I am not willing to certify that an appeal presents a substantial question for review within the meaning of 28 U.S.C. § 753(f). I am not certifying anything at all regarding this appeal.

ample to present to the Court of Appeals any issues regarding the procedural posture of this case, the only issues from which an appeal could be taken in good faith within the meaning of 28 U.S.C. § 1915(a).

5. *Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989)* – Plaintiff moves for an order, pursuant to Fed. R. App. P. 24(a), for leave to proceed on appeal *in forma pauperis*. Because plaintiff makes an adequate showing of poverty, that motion is GRANTED.

CONCLUSION

To summarize: Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is DENIED. The Notice of Appeal to District Court Judge (filed June 22, 1989) is DISMISSED. Plaintiffs' [sic] Motion for a Stay of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989) is DENIED. Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989) is DENIED. The Motion for Order (filed July 12, 1989) is DENIED. Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989) is DENIED. Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989) is GRANTED.

It is so ordered.

Dated at New Haven, Connecticut, this 17th day of August 1989.

/s/ José A. Cabranes
José A. Cabranes
United States District Judge

United States Court of Appeals,
Second Circuit.

John J. McCARTHY,
Plaintiff-Appellant,

v.

George BRONSON, Warden, Lt. Steve T. Ozier, Officer Paul Lusa, and Officer Michiewicz, Individually and in their official capacities as Officers of the Connecticut Department of Correction. Defendants-Appellees.

No. 651. Docket 89-2389.

Submitted March 1, 1990.

Decided June 22, 1990.

Before OAKES, Chief Judge, NEWMAN and WALKER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

John J. McCarthy, a state prisoner, appeals *pro se* from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in favor of the defendant state prison officials. McCarthy sued under 42 U.S.C. § 1983 (1982), alleging unlawful removal from his cell and use excessive force. The judgment was entered after a hearing conducted by Magistrate F. Owen Eagan. The case is complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings. The appeal challenges procedural irregularities concerning the reference to the Magistrate, the lack of a jury trial, the denial

of a free copy of a hearing transcript, and the merits of the fact-finding. We affirm.

Before setting forth the procedural facts, it will be helpful to outline pertinent provisions of the Federal Magistrates Act, 28 U.S.C. §§ 631-39 (1982 & Supp. V 1987). Four types of reference from a district judge to a magistrate are implicated in this case. First, subsection 636(b)(1) permits a judge to designate a magistrate to handle pretrial matters, with the Magistrate authorized by subsection 636(b)(1)(A) to rule on most pretrial motions and authorized by subsection 636(b)(1)(B) to recommend rulings on motions excepted from subsection 636(b)(1)(A). Second, subsection 636(b)(1)(B) also permits a judge to designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court . . . of prisoner petitions challenging conditions of confinement." Third, subsection 636(b)(2) permits a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of [Title 28] and the Federal Rules of Civil Procedure." This subsection also permits a judge to designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to Fed.R.Civ. P. 53(b), which limits use of a master to exceptional cases. Fourth, subsection 636(c) permits a magistrate, upon consent of the parties, to try any civil case and render a judgment.

Background

Plaintiff's original complaint, filed in April, 1983, alleged that various officials at the Connecticut Correctional Institution at Somers had ordered or carried out his forcible removal from his prison cell by means of tear gas and excessive force, in violation of the Eighth and Fourteenth Amendments. The complaint named only Warden Robinson as a defendant and made no demand for a jury trial. Shortly after the complaint was filed, Judge Cabranes referred the case to Magistrate Eagan for pretrial proceedings under 28 U.S.C. § 636(b)(1)(A), a reference that was soon broadened. On February 28, 1985, in open court and plaintiff and defendant's counsel executed a standard consent form, agreeing to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c), and electing to take any appeal from the magistrate's judgment to the district judge, pursuant to § 636(c)(4). At that time, the Magistrate explained to McCarthy that the trial would be held by the Magistrate at Somers Prison without a jury. McCarthy did not object. Conducting non-jury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible. On March 5, 1985, Judge Cabranes entered an order referring the case to Magistrate Eagan "for all further proceedings and the entry of judgment in accordance with Title 28, § 636(c)."

On April 12, 1985, McCarthy filed an amended complaint. This complaint added several defendants but did not alter the substantive allegations. It made no jury demand. On July 2, 1985, he filed a second amended complaint, against adding parties but not altering his substantive allegations. This complaint contained a jury

demand. Defendants filed their answer to the second amended complaint on August 26, 1985. No answer had been filed to the prior complaints.

On October 23, 1986, defendants filed papers opposing plaintiff's jury demand, contending, among other things, that McCarthy had agreed to a non-jury trial before the Magistrate on February 28, 1985. On December 22, 1986, Judge Cabranes ruled that plaintiff was not entitled to a jury trial; he relied on the absence of a timely jury demand, *see* Fed.R.Civ.P. 38(b), (d), and noted that the right to a jury trial, once waived, is not revived by an amended complaint that raises no new issues, *see Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310-11 (2d Cir.1973) (in banc). On October 22, 1987, McCarthy moved for a jury trial; the Magistrate recommended denial based on the District Judge's 1986 ruling, and Judge Cabranes adopted this recommendation on January 29, 1988.

On March 24, 1988, plaintiff appeared before the Magistrate for a bench trial at Somers Prison. At the start of the trial, the Magistrate sought a second written consent to proceed under subsection 636(c), even though a first consent had been executed on February 28, 1985. McCarthy refused. Apparently, the Magistrate construed McCarthy's refusal to sign the second consent form as a motion to withdraw the original consent and granted the motion. Magistrate Eagan then conducted an eight-day trial at the conclusion of which he issued a decision entitled "Recommended Findings of Fact and Memorandum of Decision." He recommended detailed findings of fact and ultimate conclusions that excessive force had not been used and that no unlawful action had occurred.

When the matter reached the District Court, Judge Cabranes accepted the recommended findings and ordered judgment for the defendants. His endorsement of the Magistrate's proposed findings reflected the Judge's understanding that the matter had been referred under subsection 636(b)(1), *i.e.*, referred for recommended findings. However, in ruling on post-judgment motions, Judge Cabranes amended the citation to subsection 636(b)(1) and stated that after allowing the plaintiff to withdraw his consent, Magistrate Eagan had "essentially act[ed] as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules." Judge Cabranes then adopted the Magistrate's recommended findings, acting under Fed.R.Civ.P. 53(e)(2), which requires a district judge to accept a special master's findings of fact unless clearly erroneous. Finally, the District Judge added, "Even upon a *de novo* determination I would reach the same conclusions as the Magistrate." All motions for post-judgment relief were denied.

Discussion

The tangled sequence of events has created some problems, but none that impairs the validity of the judgment rejecting plaintiff's claims on their merits.

1. *The Authority of the Magistrate.*

The parties' February 28, 1985, consent to have the matter tried by the Magistrate pursuant to subsection 636(c) was entirely valid. Once given, that consent may be withdrawn on the Court's own motion "for good cause

shown" or on request of a party who shows "extraordinary circumstances" warranting such relief. 28 U.S.C. § 636(c)(6); *see Fellman v. Fireman's Fund Insurance Co.*, 735 F.2d 55, 57-58 (2d Cir.1984). No such circumstances existed in this case. The Magistrate therefore could have proceeded under the original 636(c) reference, made findings, and entered judgment. However, he elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference.

Having vacated the 636(c) reference, the Magistrate then used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning "prisoner petitions challenging conditions of confinement." Whether he acted permissibly is our initial inquiry. The matter had originally been referred to the Magistrate for pretrial purposes, under the authority of subsections 636(b)(1)(A) and (B). Arguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given, but we do not think he was required to take such a narrow view of his authority. With complete propriety, he could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help. It would be a needless ritual now to require the District Judge formally to refer the matter under the "prisoner petition" clause of subsection 636(b)(1)(B). The Judge's adoption of the recommended

findings demonstrates that the Magistrate was acting entirely in conformity with authority the Judge wished him to exercise.

A more substantial question is whether McCarthy's lawsuit is a petition "challenging the conditions of confinement" within the meaning of subsection 636(b)(1)(B). Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub.L. 94-577, 90 Stat. 2729. The House Report does not explain the category "prisoner petitions challenging conditions of confinement" but does refer to "petitions under section 1983 of Title 42." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Admin.News 6162, 6171. Most courts have construed the phrase broadly to include almost any complaint made by a prisoner against prison officials, *see Branch v. Martin*, 886 F.2d 1043, 1045 n. 1 (8th Cir.1989) (collecting cases). However, there is a minority view that has focused on the phrase "conditions of confinement" and concluded that it covers only challenges to pervasive prison conditions and excludes claims concerning specific episodes of misconduct by prison officials. *See e.g., Houghton v. Osborne*, 834 F.2d 745 (9th Cir.1987); *Hill v. Jenkins*, 603 F.2d 1256, 1259 (7th Cir.1979) (Swygert, J., concurring).

We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase "conditions of confinement" appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all

grievances occurring during prison confinement. This meaning emerges from comparing the phrase with the immediately preceding category in subsection 636(b)(1)(B) that covers "applications for posttrial relief made by individuals convicted of criminal offenses." Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges to conditions of confinement). *See generally Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

The Magistrate was therefore entitled to hold a hearing on McCarthy's complaint and submit recommended findings to the District Judge.

2. *The Authority of the District Judge.* After initially viewing the Magistrate's proposed findings as submitted under subsection 636(b)(1) and adopting them, Judge Cabranes altered his view in his post-judgment ruling and considered the Magistrate's findings to be "essentially" those of a special master acting under subsection 636(b)(2). Then, explicitly referring to Rule 53(e)(2) of the Federal Rules of Civil Procedure, governing judicial consideration of a master's findings in a nonjury case, the District Judge accepted the findings as not clearly erroneous, the standard under Rule 53(e)(2). Had the Judge stopped there, his ruling would have been infirm for two reasons.

First, the Magistrate made and forwarded his findings under subsection 636(b)(1), and that subsection

requires *de novo* review of any proposed findings to which objection was made. Though we are confident that the Magistrate would exercise the same high degree of care and conscientiousness whether his findings were to be reviewed *de novo* or under a clearly erroneous standard, we would have considerable doubt whether proposed findings made in the expectation of plenary review would be valid, absent reassessment by the recommender, if in fact they received review only under a less rigorous standard. Second, we would also doubt whether this fairly straightforward section 1983 suit would qualify for reference to a special master under the exacting standards of Rule 53(b) (in nonjury matters "a reference shall be made only upon a showing that some exceptional condition requires it" except where a claim requires an accounting or a difficult computation of damages).

Fortunately, the District Judge did not confine his review to the narrow scope appropriate for findings of a special master. Judge Cabranes explicitly determined that upon a *de novo* determination he "would reach the same conclusions as the Magistrate regarding the matters to which there has been objection." This confirmation of the discharge of his responsibilities, as he had originally exercised them under subsection 636(b)(1) when he first adopted the proposed findings, eliminates all question as to the validity of the findings.

3. *Waiver of Jury Trial.* McCarthy contends that he was entitled to a jury trial and never waived this right. The District Judge denied McCarthy a jury on the ground that he had not made a timely demand, pointing out that the initial complaint did not claim a jury and that the second amended complaint, making the demand, added

no new substantive allegations. The Civil Rules require a demand for jury trial on an issue no later than ten days "after the service of the last pleading directed to such issue." Fed.R.Civ.P. 38(b). Failure to make a timely demand constitutes a waiver. *Id.* 38(d). However, "the last pleading directed to" an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply, *id.* Rule 12(a); *see 5 Moore's Federal Practice* ¶38.39[2], at 38-367 (2d ed. 1988). In this case, no answer was filed to either the original complaint or the first amended complaint. The answer to the second amended complaint was not filed until August 26, 1985, after plaintiff had made a jury demand. There was thus no waiver by reason of a late demand.

Nor, as the defendants contend, relying on *Lovelace v. Dall*, 820 F.2d 223, 227-29 (7th Cir.1987), was there a waiver because McCarthy did not object to proceeding without a jury at the start of the hearing before the Magistrate. *See also Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018-19 (2d Cir.1989). *Lovelace* deemed the plaintiff to have acceded to a bench trial by not objecting at its start, but the case differs significantly from ours because the issue of entitlement to a jury was never litigated. By contrast, McCarthy's jury claim was challenged by the defendants and adjudicated by the District Court. Once that adverse ruling was made, McCarthy was not required to renew his jury demand at the start of the Magistrate's hearing in 1988.

Nevertheless, the defendants are correct in urging that McCarthy waived entitlement to a jury in the

proceedings before the Magistrate in 1985 when he consented to proceeding under subsection 636(c). At that time, the Magistrate explained to McCarthy in open court that the proceedings would be conducted at the prison as a bench trial without a jury. With that understanding, McCarthy agreed to the subsection 636(c) procedure. This agreement was consent to a non-jury trial under Rule 39(a). The fact that the Magistrate, three years later, permitted McCarthy to renege on his agreement to have the issues tried by the Magistrate under subsection 636(c) and instead made recommended findings subject to de novo review by the District Judge under subsection 636(b)(1) does not undermine the waiver of a jury. McCarthy, though not entitled to any change, succeeded in changing the identity of the judicial officer with final fact-finding responsibility; he did not thereby rescind his consent to have the facts found by a judicial officer.

Nor is the waiver invalid because it occurred prior to the defendants' answer. There is no starting time for jury waivers. They may be agreed to even before a lawsuit arises. *See Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C.Cir. 1963). Though a litigant might have a basis for obtaining relief from a jury waiver where a subsequent pleading alters the nature of the issue to be decided from what it appeared to be at the time of the waiver, the defendants' answer here had no such effect.

4. *Free Transcript*. Judge Cabranes denied plaintiff's request for a free transcript of the hearing before the Magistrate, relying on 28 U.S.C. § 753(f) (free transcripts not required where issues frivolous). Though the procedural issues in this case are not frivolous, their resolution does not require examination of the evidence

presented at the hearing before the Magistrate, and it was not error to deny McCarthy a free copy of the transcript of that hearing.

5. *Fact-finding*. McCarthy's challenge to the factfinding is without substance. He contends that prison officers planted a knife in his cell as a pretext to remove him. The Magistrate and the District Judge were entitled to reject this claim.

We have considered McCarthy's remaining contentions and find them without merit. The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of August, one thousand nine hundred and ninety.

Present: Hon. James L. Oakes, Ch. J.,
Hon. Jon O. Newman,
Hon. John M. Walker, Jr.,

JOHN J. McCARTHY,

Plaintiff-Appellant,

v.

GEORGE BRONSON, Warden,
LT. STEVE TOZIER,
Officer PAUL LUSA and
Officer MICKIEWICZ
added 4/12/85,

Defendants-Appellees.

DOCKET NO.
89-2389

A petition for rehearing having been filed herein by Plaintiff-Appellant, John J. McCarthy, pro se.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

SUPREME COURT OF THE UNITED STATES

No. 90-5635

John M. McCarthy,

Petitioner

v.

George Bronson, Warden, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Whether 28 U.S.C. Section 636(b)(1)(B), which authorizes a district court to refer, without the parties consent, to a magistrate for recommended findings a prisoner petition that challenges 'conditions of confinement' applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions."

December 10, 1990
